STATE OF MICHIGAN

COURT OF APPEALS

DEBRA LEA MILLER, Plaintiff-Appellant, v JOHN THOMAS MILLER, Defendant-Appellee.	FOR PUBLICATION November 30, 2004 9:00 a.m. No. 242470 Wayne Circuit Court LC No. 01-102843-DM Official Reported Version

Before: Smolenski, P.J., and Saad and Kelly, JJ.

KELLY, J. *(dissenting).*

I respectfully dissent from the majority's decision to reverse the trial court's order denying plaintiff's motion to vacate the arbitration award. I believe that the public policy that the majority unwisely attempts to create threatens to disrupt the arbitration process by causing instability in this area of the law and threatening the finality of arbitration awards. The decision departs not only from the plain language of the domestic relations arbitration act (DRAA), MCL 600.5070 *et seq.*, but also from existing precedent. The protection that the Legislature and the courts have afforded is the protection of the parties' agreement to arbitrate without unwarranted intrusion by the courts. The very reason appellate review of arbitration is limited is to afford this protection. I would affirm.

I. Standard of Review

"We review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award." *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). Our review of a binding arbitration award is "strictly limited by statue and court rule." *Krist v Krist*, 246 Mich App 59, 66; 631 NW2d 53 (2001). Because the arbitration order was entered after the effective date of 2000 PA 419 and 420, this case is governed by the specific statutory scheme set forth in the DRAA. *Harvey v Harvey*, 257 Mich App 278, 283; 668 NW2d 187 (2003), aff'd 470 Mich 186; 680 NW2d 835 (2004). The primary goal of statutory interpretation is to give effect to the intent of the Legislature by examining the plain language of the statute. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999).

II. The Plain Language of the DRAA

I disagree with the majority's conclusion that the arbitrator failed to comply with the requirements of the DRAA. The majority reads into the DRAA a requirement that does not exist and precludes an arbitration procedure the DRAA does not preclude.

The majority correctly points out that the DRAA sets forth several specific requirements for arbitration. For example, the DRAA requires a signed agreement by the parties, MCL 600.5071, that delineates the arbitrator's powers and duties, MCL 600.5072. The DRAA also requires that the arbitrator "hear and make an award on each issue submitted for arbitration under the arbitration agreement subject to the provisions of the agreement." MCL 600.5074(1). But the DRAA does not define "hearing," nor does it set forth any specific requirements for a hearing. Notably, the majority states that "hearing" is a word "that has a clear meaning [and] must be given its clear meaning," but the majority opinion does not indicate what a hearing *is*, only what it *is not*. *Ante* at ___. In a footnote, the majority refers to the dictionary definitions of "hearing," *ante* at ___, and concludes that what took place in this case did not constitute what is "commonly understood" as a hearing. *Ante* at ___. This provides little guidance for future judicial review and impermissibly imposes requirements beyond those imposed by the DRAA.

Pursuant to the majority opinion, parties may now appeal arbitration awards on the nebulous grounds that the procedure leading to the arbitration award was not a "hearing." But when these arbitration awards are appealed, there will likely be no record for this Court to review. Except in limited circumstances not applicable here, the DRAA *prohibits* making a record of arbitration hearings:

> Except as provided by this section, court rule, or the arbitration agreement, *a record shall not be made of an arbitration hearing under this chapter*. If a record is not required, an arbitrator may make a record to be used only by the arbitrator to aid in reaching the decision. The parties may provide in the arbitration agreement that a record be made of those portions of a hearing related to 1 or more issues subject to arbitration. [MCL 600.5077(1). (emphasis added).]

In the best-case scenario, the parties will generally agree about how the arbitration took place. In the worst-case scenario, the parties will disagree. How then will a court proceed to review the arbitration proceedings to determine if they constituted a "hearing" in accord with the majority's opinion, in which "hearing" is left undefined? Clearly if the Legislature had contemplated judicial review to determine whether arbitration hearings comported with some formulaic procedure, it would have *required* rather than *prohibited* recording arbitration hearings.

In addition to leaving "hearing" undefined and prohibiting making a record of arbitration hearings, the Legislature has strictly limited judicial review of arbitration awards. MCL 600.5081(2) provides:

> If a party applies under this section, the court shall vacate an award under any of the following circumstances:

(a) The award was procured by corruption, fraud, or other undue means.

(b) There was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights.

(c) The arbitrator exceeded his or her powers.

(d) The arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

Accordingly, the DRAA permits vacation or modification only if the arbitrator conducts a hearing in a prejudicial, corrupt, or fraudulent manner or if the arbitrator exceeds his or her powers, i.e., those powers that derive from the parties' agreement to arbitrate.

The DRAA specifies that the arbitrator's power is directly conferred by the parties' agreement:

> The court shall not order a party to participate in arbitration unless each party to the domestic relations matter acknowledges, in writing or on the record, that he or she has been informed in plain language of all of the following:
>
> * * *
>
> (e) The arbitrator's powers and duties are delineated in a written arbitration agreement that all parties must sign before arbitration commences.
>
> (f) During arbitration, the arbitrator has the power to decide each issue assigned to the arbitration under the arbitration agreement. The court will, however, enforce the arbitrator's decisions on those issues. [MCL 600.5072(1).]

Our courts have also recognized that "[a]rbitrators derive their authority to act from the parties' arbitration agreement." *Krist, supra* at 62, citing *Gordon Sel-Way, Inc v Spence Bros, Inc,* 438 Mich 488, 495; 475 NW2d 704 (1991). Arbitration is generally recognized as a matter of contract. *Rowry v Univ of Michigan,* 441 Mich 1, 10; 490 NW2d 305 (1992). Arbitration agreements are generally interpreted in the same manner as ordinary contracts; they must be enforced according to their terms to effectuate the intentions of the parties. *Amtower v William C Roney & Co,* 232 Mich App 226, 233-234; 590 NW2d 580 (1998).

Nothing in the plain language of the DRAA preludes parties from agreeing to a particular format for the arbitration procedure. The majority opinion, which precludes a divorcing couple from agreeing on an arbitration procedure, erroneously limits the parties' ability to contract. This directly contravenes the plain language of the DRAA, which affords the parties a degree of self-determination, lessens governmental intrusion into their private lives, avoids adversarial posturing, and reduces personal antagonisms. Not only does the DRAA encourage the parties to enter a contract to arbitrate, it also facilitates further agreement between the parties with respect

to the procedural form of the arbitration hearing. This allows the parties to take responsibility for creating the method of resolving their dispute—a method that is uniquely suited to their relationship and resources. The DRAA sets forth the requirements of this step in the arbitration process in MCL 600.5076(1), which provides:

> As soon as practicable after the appointment of the arbitrator, the parties and attorneys shall meet with the arbitrator to consider all of the following:
>
> (a) Scope of the issues submitted.
>
> (b) Date, time, and place of the hearing.
>
> (c) Witnesses, including experts, who may testify.
>
> (d) Schedule for exchange of expert reports or summary of expert testimony.
>
> (e) Subject to subsection (2), exhibits, documents, or other information each party considers applicable and material to the case and a schedule for production or exchange of the information. If a party knew or reasonably should have known about the existence of information the party is required to produce, that party waives objection to producing that information if the party does not object before the hearing.
>
> (f) Disclosure required under section 5075.[1]

Thus, reading the statute as a whole, it is clear that the safeguards the Legislature imposed through the DRAA do not require the arbitrator to conduct arbitration in any specific manner (because no specifics are set forth), but do require the arbitrator to conduct the hearing *in accordance with the parties' agreement.* The majority's professed aversion for the procedure on which the parties agreed does not provide a basis for vacating the award. "A court must not judicially legislate by adding into a statute provisions that the Legislature did not include." *In re Wayne Co Prosecutor,* 232 Mich App 482, 486; 591 NW2d 359 (1998). Further, although the majority refers to the process as mediation, the process was still binding; binding mediation is equivalent to arbitration and subject to the same judicial limitations on review. *Frain v Frain,* 213 Mich App 509, 511-513; 540 NW2d 741 (1995).

III. Precedent and Policy

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[1] MCL 600.5075 requires the arbitrator to disclose any circumstance that may affect his or her impartiality.

The majority opinion also contravenes existing precedent and the underlying public policy regarding arbitration. Historically, Michigan courts have declined to establish requirements for arbitration proceedings. Michigan public policy favors arbitration to resolve disputes. *Rembert v Ryan's Family Steak Houses, Inc*, 235 Mich App 118, 128; 596 NW2d 208 (1999). As such, the scope of judicial review of arbitration is very narrow and procedural matters should be left to the arbitrator. *Huntington Woods v Ajax Paving Industries, Inc*, 177 Mich App 351, 356; 441 NW2d 99 (1989). The Michigan Supreme Court has acknowledged that judicial review of arbitration is restricted because courts are generally reluctant to speculate on what caused the arbitrator to rule as it did. "It is only the kind of legal error that is evident without scrutiny of intermediate mental indicia which remains reviewable . . . ." *DAIIE v Gavin*, 416 Mich 407, 429; 331 NW2d 418 (1982). The Court recognized that, with regard to arbitration, "there are no formal requirements of procedure and practice beyond those assuring impartiality, and no findings of fact or conclusions of law are required." *Id.* at 428. It also recognized that arbitration procedures are "informal and sometimes unorthodox . . . ." *Id.* at 429. In a departure from this precedent, the majority has put restrictions on the arbitration process that neither the Legislature nor our courts saw fit to impose.

IV. Analysis

A closer look at the facts of this case reveals that the arbitrator did not, as the majority avers, unfairly deny plaintiff's requests, refuse to hear plaintiff's evidence, or unfairly conduct the hearing. Although there is no record of the arbitration proceedings, the majority opinion adopts without question and assumes as true plaintiff's assertions about what took place and what was said at arbitration. Because there is no record of the arbitration procedure, it is impossible for this Court to determine the veracity of plaintiff's assertions. But, on a basic level, the parties do not dispute that the arbitrator first met briefly with the parties and their attorneys to discuss the arbitration procedure. At that time, the parties *agreed* that, because of their acrimonious relationship, the arbitrator should meet with the parties and their respective attorneys separately. Neither party objected to this procedure; rather, each party voluntarily entered a separate room. Then each party, in the presence of his or her attorney, voluntarily spoke with the arbitrator.

Nonetheless, sometime after the hearing concluded, plaintiff's attorney contacted the arbitrator and requested additional arbitration sessions for plaintiff to further present her case and challenge defendant's assertions. Plaintiff also sent the arbitrator two amended arbitration statements and additional documentation pertaining to defendant's income.

The arbitrator issued a proposed award without scheduling further sessions. In his findings of fact, he noted that plaintiff had requested further sessions. But he concluded that plaintiff raised nothing new that would justify further delay. The arbitrator summarized the evidence regarding the breakdown of the marriage and concluded that both parties were at fault.

After receiving the proposed award, plaintiff again requested continued arbitration. The arbitrator gave plaintiff three days to submit an outline of the issues she wanted to pursue. Plaintiff provided the arbitrator with a lengthy response to the award. She asked for the

opportunity to present further evidence of defendant's inappropriate use of massage parlors and escort services, and to cross-examine defendant in this regard, to establish that defendant caused the breakdown of the marriage. Plaintiff also complained about nearly every aspect of the award itself.

The arbitrator rendered a final, binding arbitration award in which he stated that he had considered plaintiff's concerns, but found that plaintiff failed to raise any new facts or issues. He also noted that he considered the cumulative evidence, as well as any new facts raised by both parties. The final arbitration award was substantially similar to the first award, with some revisions in response to plaintiff's concerns. As far as plaintiff's complaints about the procedure, the arbitrator commented:

> The following summary, and the findings contained therein, are based on the credible testimony of the parties; the credible information contained in any exhibit; the arguments of the lawyers, and the lengthy summaries filed by both counsel.
>
> I have allowed both sides the opportunity to present anything further they felt was necessary to a full and complete understanding of their respective positions. Each side has submitted lengthy, additional summaries, all of which have been reviewed in detail, and against all the other evidence submitted. Plaintiff has insisted on additional "hearings". Plaintiff claims that the Award proffered to counsel for comment, was unfair, and that an ability to "confront" the Defendant and cross examine him would effect [sic] drastically his credibility.
>
> The Arbitrator asked the plaintiff to submit a list of items that required such hearings. No list was received, but another summary was provided. The plaintiff's last summary (which was more an appeal of the proposed award) was answered by the Defendant. All of those submissions have also been carefully considered.
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> The defendant argues that all of the after hearing submissions of the Plaintiff are simply a rehash of old issues, and that no new issues are raised. I find that no new issues are raised. I further find that all of the topics addressed by the Plaintiff, post-hearing, were discussed on the day of the hearing I have considered the cumulative evidence, as well as any "new" facts raised by both sides.
>
> Plaintiff's counsel takes issue with the format of the hearing, now suggesting that it should have had a more formal structure, and that the plaintiff's right of confrontation would have added another dimension to this Arbitrator's appraisal of the case. *The parties agreed to the informal nature of the hearing, and it was not until after the proposed award that any suggestion was made to testimony in a confrontational mode.* [Emphasis added.] Further, had the hearing been more formal, almost none of the written evidence would have come into the

> record, because most of the exhibits were hearsay. [Emphasis deleted.] Much of the commentary by the lawyers was only supported by hearsay documents.

The majority further departs from existing precedent in that it finds error in the arbitrator's findings of fact. "Claims that the arbitrator made a factual error are beyond the scope of appellate review." *Konal v Forlini*, 235 Mich App 69, 75; 596 NW2d 630 (1999). In the emphasized portion of the arbitrator's award, the arbitrator found that the parties agreed to the informal nature of the hearing. In concluding that plaintiff did not agree to this procedure and was confused by it, the majority has improperly assigned error to the arbitrator's finding.

Even if this Court could properly review the arbitrator's findings of fact, the majority ignores several important factors. First, the arbitrator considered all of plaintiff's proffered evidence. Plaintiff cannot cite a single piece of evidence that was not considered. With regard to cross-examination, the arbitrator did not "unfairly" deny plaintiff's request to cross-examine defendant, though he did deny her request. The denial was not unfair because, before plaintiff's request, the parties had agreed to meet the arbitrator separately and voluntarily did so. Moreover, plaintiff wanted to cross-examine defendant about his infidelities, which, according to the arbitration award, defendant generally admitted. Finally, plaintiff did not complain that the arbitrator failed to comply with procedural requirements of the DRAA until *after* the arbitration award was issued. It is paternalistic to conclude that plaintiff, a competent adult who entered into an agreement in the presence of her attorney and voluntarily participated in the arbitration hearing while represented by her attorney, "found it difficult to define . . . what transpired." *Ante* at ___. The only thing plaintiff found difficult was accepting the arbitration award, despite having agreed to binding arbitration and the arbitration procedure.

V. Conclusion

I would affirm the arbitration award because there is no proper basis for vacating it: although the arbitration procedure was "informal" and "unorthodox," *DAIIE, supra* at 429, there is no indication that the procedures exceeded the arbitrator's authority or lacked impartiality. The parties were "afforded basic, protective rights, the most important of which is a full and fair hearing." *Ante* at ___.

/s/ Kirsten Frank Kelly